

# *Virginia Regulatory Town Hall*

## Periodic Review of Existing Regulations Agency Background Document

<b>Agency Name:</b>	State Air Pollution Control Board
<b>Regulation Title:</b>	Regulation for General Administration
<b>Subtitle:</b>	None
<b>VAC Number:</b>	9 VAC 5 Chapter 170 (9 VAC 5-170-10 et seq.)
<b>Date:</b>	04/01/01

This information is required pursuant to the Administrative Process Act § 9-6.14:25 and Executive Order Twenty-Five (98) which outline procedures for periodic review of regulations of agencies within the executive branch. Each existing regulation is to be reviewed at least once every three years and measured against the specific public health, safety, and welfare goals assigned by agencies during the promulgation process.

### Summary

*Please provide a brief summary of the regulation and its purpose. There is no need to state each provision, instead give a general description of the regulation.*

The purpose of regulation is to specify the procedures for governing the general (not program-specific) administration of the regulatory program of the State Air Pollution Control Board.

The regulation establishes provisions governing general administration, specifically hearings and proceedings; policy and procedural information and guidance; availability of information; establishment of regulations and orders; public participation in regulation development; enforcement of regulations, permits and orders; right of entry; variances; local ordinances; conditions on approvals; considerations for approval actions; delegation of authority; and appeal of board actions.

### Legal Requirements

*Please identify the state and/or federal source of the legal requirements that necessitate promulgation of the regulation. The discussion of these requirements should include a description of their scope and the extent to which the requirements are mandatory or discretionary. Full citations for the legal requirements and, if available, web site addresses for locating the text of the cited legal provisions should be provided.*

#### Federal Requirements

Federal Clean Air Act (CAA):

<http://www.epa.gov/ttn/oarpg/gener.html>

Code of Federal Regulations (CFR):

<http://www.access.gpo.gov/nara/cfr/cfr-retrieve.html>

Federal Register (FR):

[http://www.gpo.gov/su\\_docs/aces/aces140.html](http://www.gpo.gov/su_docs/aces/aces140.html)

*Applicability:* 40 CFR 51.230 specifies that each state implementation plan must show that the state has the legal authority to carry out the plan, including the authority to abate pollutant emissions on an emergency basis to prevent substantial endangerment to the health of persons.

*Establishment of regulations and orders:* 40 CFR 51.230 specifies that each state implementation plan must show that the state has the legal authority to carry out the plan, including the authority to adopt emission standards and limitations and any other measures necessary for the attainment and maintenance of the national ambient air quality standards.

40 CFR 51.231 requires the identification of legal authority, including the provisions of law or regulation which the state determines provide the authorities required under this section must be specifically identified, and copies of such laws or regulations must be submitted with the state implementation plan.

*Enforcement of regulations, permits and orders:* 40 CFR 51.230 specifies that each state implementation plan must show that the state has the legal authority to carry out the plan, including the authority to enforce applicable laws, regulations, and standards, and seek injunctive relief; and to abate pollutant emissions on an emergency basis to prevent substantial endangerment to the health of persons.

*Availability of information:* Code of Federal Regulations Title 40 § 51.230 specifies that each state implementation plan must show that the state has the legal authority to carry out the plan, including the authority to make emissions data available to the public as reported and as correlated with any applicable emission standards or limitations.

### State Requirements

Code of Virginia:

<http://leg1.state.va.us/000/cod/codec.htm>

Virginia Administrative Code (VAC):

<http://leg1.state.va.us/000/reg/toc.htm>

*Establishment of regulations and orders:* Code of Virginia § 9-6.14:4.1 C 5 exempts from the provisions of the Administrative Process Act regulations necessitated by an emergency situation.

Code of Virginia § 9-6.14:7.1 D specifies that each agency shall develop guidelines for soliciting public input on the development of its regulations. The guidelines shall set out methods for the identification and notification of interested parties and the means of seeking input from interested persons or groups which the agency intends to use in addition to the Notice of Intended Regulatory Action. The guidelines shall set out a general policy for the use of standing or ad hoc advisory panels and consultation with groups and individuals registering interest in working with the agency. Such policy shall address the circumstances in which the agency considers such panels or consultation appropriate and intends to make use of such panels or consultation.

Code of Virginia § 10.1-1307 A provides that the board may, among other activities, develop a comprehensive program for the study, abatement, and control of all sources of air pollution in the Commonwealth.

Code of Virginia § 10.1-1307 D specifies that the board may, among other activities, hold hearings and enter orders diminishing or abating the causes of air pollution and issue orders to enforce its regulations; and may institute legal proceedings for the enforcement of orders, regulations, and penalties.

Code of Virginia § 10.1-1308 specifies that the board shall have the power to promulgate regulations abating, controlling, and prohibiting air pollution throughout or in any part of the Commonwealth in accordance with the provisions of the Administrative Process Act.

Code of Virginia § 10.1-1309 specifies that the board shall have the power to issue special orders, under certain circumstances, to owners of facilities emitting air pollution ordering the cessation of operation of those facilities. Such special orders are to be issued only after a hearing with reasonable notice to the affected owners of the time, place, and purpose of the hearing. Such special orders shall become effective not less than five days after service. The board shall also have the power to issue emergency special orders, under certain circumstances, ordering the cessation of operation of polluting facilities without a hearing. Within ten days after the issuance of an emergency special order, the board shall hold a hearing, after reasonable notice as to the time and place thereof to the owner, to affirm, modify, amend, or cancel the emergency special order. If the board finds that an owner who has been issued a special order or an emergency special order is not complying with the terms thereof, it may proceed in accordance with § 10.1-1316 (Enforcement and civil penalties) or § 10.1-1320 (Judicial review of regulations of board).

Virginia Code Commission Regulations Part III sets forth provisions for the adoption of material by reference into state regulations.

*Enforcement of regulations, permits and orders:* Code of Virginia § 10.1-1185 specifies that the director of the Department of Environmental Quality shall exercise such power and perform such duties as are conferred or imposed upon him by law and shall perform such other duties as may be required of him by the Governor and the State Air Pollution Control Board.

Code of Virginia § 10.1-1186 specifies that the Department of Environmental Quality has, among other powers, the power to implement all regulations adopted by the State Air Pollution Control Board.

Code of Virginia § 10.1-1307.3 specifies that the Executive Director or a duly authorized representative shall have the authority to supervise, administer, and enforce the law as well as regulations and orders of the board and to investigate violations of law, regulations, and orders.

Code of Virginia § 10.1-1316 specifies that any owner violating, failing, neglecting or refusing to obey any law, regulation, order, or permit condition may be compelled to comply by injunction, mandamus, or other appropriate remedy. It also specifies that any owner violating, failing, neglecting or refusing to obey a regulation, order, law, or permit condition shall be subject to a civil penalty not to exceed \$25,000 for each violation. Each day of violation shall constitute a separate offense. This section also specifies that the board may, in lieu of civil penalties, provide for the payment of civil charges in specific sums, not to exceed the limit of the civil penalties.

Code of Virginia § 10.1-1320 specifies that any owner knowingly violating any law, regulation, order, or permit condition shall upon conviction be guilty of a misdemeanor and shall be subject to a fine of not more than \$10,000 for each violation within the discretion of the court.

Code of Virginia § 10.1-1322 A specifies that the department may issue, amend, revoke, terminate, reissue, and enforce permits in the same manner as regulations and orders. Failure to comply with any condition of a permit shall be considered a violation of this chapter and investigations and enforcement actions may be pursued in the same manner as is done with regulations and orders.

*Hearings and proceedings:* Code of Virginia § 9-6.14:7.1 C specifies that agencies shall state in the Notice of Intended Regulatory Action whether they plan to hold a public hearing on the proposed regulation after it is published. Agencies shall hold such public hearings if required by basic law, if the Governor directs that the agency shall hold a public hearing, or if the agency receives requests for a public hearing from twenty-five persons or more.

Code of Virginia § 9-6.14:7.1 E specifies that, in formulating any regulation, the agency shall afford interested persons an opportunity to submit data, views, and arguments to the agency.

Code of Virginia § 9-6.14:7.1 F specifies that for all but exempted regulations, the proposed regulation and general notice of opportunity for oral or written submittals as to that regulation shall be published in the Virginia Register of Regulations. In addition, the agency may (i) publish the notice in any newspaper and (ii) publicize the notice through press releases and such other media as will best serve the purpose and subject involved. The Register and any newspaper publication shall be made at least sixty days in advance

of the last date prescribed in the notice for such submittals. All notices, written submittals, and transcripts, summaries or notations of oral presentations, as well as any agency action thereon, shall be matters of public record in the custody of the agency.

Code of Virginia § 9-6.14:11 specifies that agencies shall ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings unless the named party and the agency consent to waive such a conference or proceeding to go directly to a formal hearing. Such proceedings shall ensure specific rights of parties to the case. This section also specifies other procedures pertaining to informal fact-findings.

Code of Virginia § 9-6.14:12 specifies that the agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in any case in which the basic laws provide expressly for decisions upon or after hearing and may do so in any case to the extent that informal procedures have not been had or have failed to dispose of a case by consent. This section also specifies other procedures pertaining to formal hearings.

Code of Virginia § 10.1-1307 C, D, and F specify that the board may grant local variances from regulations and issue orders to that effect only after a public hearing has been conducted pursuant to the public advertisement of the hearing and the public has been given the opportunity to comment on the variance; may hold hearings and enter orders diminishing or abating the causes of air pollution and issue orders to enforce its regulations; may institute legal proceedings for the enforcement of orders, regulations, and penalties; and may designate one of its members, the director, or a staff assistant to conduct the hearings provided for in this chapter. A record of the hearing shall be made and furnished to the board for its use in arriving at a decision.

Code of Virginia § 10.1-1309 specifies that the board shall have the power to issue special orders, under certain circumstances, to owners of facilities emitting air pollution ordering the cessation of operation of those facilities. Such special orders are to be issued only after a hearing with reasonable notice to the affected owners of the time, place, and purpose of the hearing. Such special orders shall become effective not less than five days after service. The board shall also have the power to issue emergency special orders, under certain circumstances, ordering the cessation of operation of polluting facilities without a hearing. Within ten days after the issuance of an emergency special order, the board shall hold a hearing, after reasonable notice as to the time and place thereof to the owner, to affirm, modify, amend, or cancel the emergency special order. If the board finds that an owner who has been issued a special order or an emergency special order is not complying with the terms thereof, it may proceed in accordance with § 10.1-1316 (Enforcement and civil penalties) or § 10.1-1320 (Judicial review of regulations of board).

*Variances:* Code of Virginia § 10.1-1307 C specifies that the board may grant local variances from regulations and issue orders to that effect only after a public hearing has been conducted pursuant to the public advertisement of the hearing and the public has been given the opportunity to comment on the variance.

Code of Virginia § 10.1-1307.01 specifies that the board shall notify localities particularly affected (i.e., localities bearing any identified disproportionate material air quality impact not experienced by other localities) before promulgating any regulation, granting any variance, or issuing any major permit. Such notice shall appear in a local paper of general circulation at least 30 days prior to the close of any public comment period and shall contain a statement of the estimated local impact of the proposed action. The notice shall be mailed to the chief elected official and chief administrative officer and the planning district commission for those localities particularly affected. Written comments shall be accepted for at least 15 days after any hearing on the regulation, variance, or permit unless the board votes to shorten the period.

*Local ordinances:* Code of Virginia § 10.1-1321 specifies that the governing body of any locality proposing to adopt an ordinance relating to air pollution after June 30, 1972, shall first obtain the approval of the board as to the provisions of the ordinance or amendment. No ordinance, except one pertaining solely to open burning, shall be approved by the board which regulates any emission source that is required to register with the board or to obtain a permit pursuant to this chapter and the board's regulations.

*Appeals:* Code of Virginia § 9-6.14:11 A specifies that agencies shall ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings unless the named party and the agency consent to waive such a conference or proceeding to go directly to a formal hearing. Such proceedings shall ensure specific rights of parties to the case.

Code of Virginia § 9-6.14:11 B specifies that agencies may, in their case decisions, rely upon public data, documents, or information only when the agencies have notified all parties with of their intent to consider such information.

Code of Virginia § 9-6.14:11 C specifies that when a board or commission meets to render an informal fact-finding decision, and information from a prior proceeding is being considered, persons who participated in the prior proceeding shall have an opportunity to respond at the meeting to any summaries of the prior proceeding.

Code of Virginia § 9-6.14:11 D specifies that in any informal fact-finding proceeding in which a hearing officer is not empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within ninety days from the date of the informal fact-finding proceeding or from a later date agreed to by the named party and the agency. If the agency does not render a decision within ninety days, the named party to the case decision may provide written notice to the agency that a decision is due. If no decision is made within thirty days from agency receipt of the notice, the decision is deemed to be in favor of the named party. The preceding sentence shall not apply to case decisions before the State Air Pollution Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Air Act. An agency shall provide notification to the named party of its decision within five days of the decision.

Code of Virginia § 9-6.14:11 E specifies that in any informal fact-finding proceeding in which a hearing officer is empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within thirty days from the date that the agency receives the hearing officer's recommendation. The other provisions of this subsection are the same as in § 9-6.14:11 D.

Code of Virginia § 9-6.14:12 A specifies that the agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in any case in which the basic laws provide expressly for decisions upon or after hearing and may do so in any case to the extent that informal procedures have not been had or have failed to dispose of a case by consent.

Code of Virginia § 9-6.14:12 B specifies that parties to formal proceedings shall be given reasonable notice of (i) the time, place, and nature thereof, (ii) the basic law or laws under which the agency contemplates its possible exercise of authority, and (iii) the matters of fact and law asserted or questioned by the agency.

Code of Virginia § 9-6.14:12 C specifies that in all formal proceedings, the parties shall be entitled to counsel, to submit oral and documentary evidence and rebuttal proofs, to conduct cross-examination, and to have the proceedings completed and a decision made with dispatch. The burden of proof shall be upon the proponent or applicant. The presiding officers at such proceedings are empowered to perform specified acts.

Code of Virginia § 9-6.14:12 D specifies that, prior to recommendations or decisions, parties concerned shall be given the opportunity to submit in writing for the record (i) proposed findings and conclusions and (ii) statements of reasons. In all cases, opportunity shall be afforded for oral argument (i) to hearing officers or subordinate presiding officers in all cases in which they make such recommendations or decisions or (ii) to the agency in cases in which it makes the original decision without such prior recommendation and otherwise as it may permit.

Code of Virginia § 9-6.14:12 E specifies that all decisions or recommended decisions shall be served upon the parties, become a part of the record, and briefly state or recommend the findings, conclusions, reasons, or basis upon the evidence presented by the record and relevant to the basic law under which the agency is operating together with the appropriate order, license, grant of benefits, sanction, relief, or denial thereof.

Code of Virginia § 9-6.14:12 F specifies that, in cases where a board or commission meets to render a decision on a litigated issue, and information from a prior proceeding is being considered, persons who participated in the prior proceeding shall have an opportunity to respond at the meeting to any summaries of the prior proceeding.

Code of Virginia § 9-6.14:12 G specifies that, in any formal proceeding in which a hearing officer is not empowered by the agency to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within ninety days from the date of the formal proceeding or from a later date agreed to by the

named party and the agency. The other provisions of this subsection are the same as in § 9-6.14:11 D.

Code of Virginia § 9-6.14:12 H specifies that, in any formal proceeding in which a hearing officer is empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within thirty days from the date that the agency receives the hearing officer's recommendation. The other provisions of this subsection are the same as in § 9-6.14:11 D.

Code of Virginia § 9-6.14:16 A specifies that any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision, shall have a right to the direct review by court action against the agency. Such actions may be instituted in any court of competent jurisdiction, and the judgments of such courts shall be subject to appeal to or review by higher courts unless otherwise provided by law. In addition, when any such regulation or case decision is the subject of an enforcement action in court, the same shall also be reviewable by the court as a defense to the action, and the judgment or decree shall be appealable as in other cases.

Code of Virginia § 10.1-1318 specifies that any owner and certain other persons aggrieved by a final decision of the board and is entitled to judicial review in accordance with the provisions of the Administrative Process Act.

*Right of entry:* Code of Virginia § 10.1-1307.3 specifies that the Executive Director or his duly authorized representative shall have the authority to supervise, administer, and enforce the law as well as regulations and orders of the board and to investigate violations of law, regulations, and orders. This section also specifies that the Executive Director or his representative shall have the authority to enter any business establishment, construction site, or other area, workplace, or environment for the purpose of inspection and investigation; and to seek from a court an order compelling such entry or inspection in the case of interference.

Code of Virginia § 10.1-1315 specifies that agents of the board and department may at reasonable times enter property, public or private, to obtain information or conduct surveys or investigations.

*Delegation of authority:* Code of Virginia § 10.1-1185 specifies that the director of the Department of Environmental Quality shall exercise such power and perform such duties as a conferred or imposed upon him by law and shall perform such other duties as may be required of him by the Governor and the State Air Pollution Control Board.

Code of Virginia § 10.1-1307 F specifies that the board may designate one of its members, the director, or a staff assistant to conduct the hearings provided for in this chapter. A record of the hearing shall be made and furnished to the board for its use in arriving at a decision.

Code of Virginia § 10.1-1307.1 B specifies that the Department of Environmental Quality shall administer the policies and regulations established by the board and perform all acts as necessary or convenient to carry out the purposes of the law.

Code of Virginia § 10.1-1307.2 specifies that the Executive Director of the Department of Environmental Quality shall exercise such powers and perform such duties as are conferred or imposed upon him by the law and shall perform such other duties required of him by the Governor and the board. It also specifies that the Executive Director may be vested with the authority of the board when it is not in session, although he may not have the authority to adopt or promulgate any regulation.

*Considerations for approval actions:* Code of Virginia § 10.1-1307 E specifies that the board in making regulations and in approving variances, control programs, or permits, and the courts in granting injunctive relief under the provisions of this chapter, shall consider facts and circumstances relevant to the reasonableness of the activity involved and the regulations proposed to control it, including the character and degree of injury to, or interference with, safety, health, or the reasonable use of property which is caused or threatened to be caused; the social and economic value of the activity involved; the suitability of the activity to the area in which it is located; and the scientific and economic practicality of reducing or eliminating the discharge resulting from such activity.

*Availability of information:* Code of Virginia § 10.1-1314 specifies that the board may request owners of air pollution sources to furnish plans, specifications, and other information as may be required by the Board in the discharge of its duties under this chapter. Any information, except emission data, as to secret processes, formulae, or methods of manufacture or production shall not be disclosed in public hearing and shall be kept confidential.

Code of Virginia § 10.1-1314.1 specifies that any information, except emissions data, obtained by the board or department which might reveal a trade secret shall be confidential and shall be limited to those persons who need such information for purposes of enforcement of this chapter or the Federal Clean Air Act or regulations and orders of the Board. Each owner has the duty to notify the department of the existence of trade secrets when he desires the protection provided herein.

#### Comparison With Statutory Mandates

No provision of the regulation exceeds the specific minimum requirements of any legally binding state or federal mandate. An explanation as to how this conclusion was reached is set forth below.

The agency performed an analysis to determine if statutory mandates justify continuation of the regulation. The analysis revealed that statutory justification does exist for the regulation. The regulation was adopted in order to implement the policy set forth in the Virginia Air Pollution Control Law and to fulfill the Commonwealth's responsibilities under the federal Clean Air Act to provide a legally enforceable State Implementation Plan for the

control of criteria pollutants. These statutes still remain in force with the provisions that initiated adoption of the regulation still intact.

Analysis reveals that the regulation is consistent with applicable state and federal regulations, statutory provisions, and judicial decisions. Factors and circumstances (statutes, original intent, state air quality program, and air pollution control methodology and technology) which justified the original issuance of the regulation have not changed to a degree that would justify a change to the basic requirements of the regulation.

Federal guidance on states' approaches to air pollution control has varied considerably over the years, ranging from very general in the early years of the Clean Air Act to very specific in more recent years. Some provisions of this regulation were adopted in 1972, when no detailed guidance existed. Therefore, the legally binding federal mandate for these provisions is general, not specific, consisting of the Clean Air Act's broad-based directive to states to meet the air quality standards.

### Public Comment

*Please summarize all public comment received as the result of the Notice of Periodic Review published in the Virginia Register and provide the agency response. If no public comment was received, please include a statement indicating that fact*

**SUBJECT:** Board's regulatory authority

**COMMENTER:** Virginia Manufacturers Association

**TEXT:** 9 VAC 5-170-160.A states:

The board may impose conditions upon permits and other approvals which may be necessary to carry out the policy of the Virginia Air Pollution Control Law, and which are consistent with the regulations of the board. Except as otherwise specified, nothing in this chapter shall be understood to limit the power of the board in this regard. If the owner or other person fails to adhere to the conditions, the board may automatically cancel the permit or approvals. This section shall apply, but not be limited, to approval of variances, approval of control programs, and granting permits.

To the regulated community this "omnibus" regulation says something like, "The Department can make a source owner do whatever the Department wants as a condition to receiving a permit." And in fact, that is very often the approach the Department takes when it invokes its authority under 9 VAC 5-170-160.

Over the years, VMA members have seen the Department drastically increase its reliance on this regulation to justify terms and conditions in air permits, both NSR and Title V permits. For example, the Department may insert a term in an NSR permit

establishing control requirements that go beyond BACT on the premise that 9 VAC 5-170-160 authorizes the Department to go beyond the BACT requirement specifically stated in the Air Board's regulations. A quick review of a random sampling of NSR permits from around the Commonwealth would show that Virginia air permits today are replete with references to 9 VAC 5-170-160 as the only justification for terms and conditions in the permit. With all of the many regulations the Air Board has adopted over the years to address all aspects of emissions from sources in the Commonwealth, our members are concerned that their permits frequently contain terms and conditions based solely on the Department's "omnibus" authority under 9 VAC 5-170-160 to impose whatever condition it sees fit in permits.

More troubling than this trend in NSR permitting is the Department's use of 9 VAC 5-170-160 to impose new requirements in Title V federal operating permits. The Department sometimes inserts new requirements in a source's Title V permit and justifies it by citing 9 VAC 5-170-160. In either the case of NSR permits or Title V permits, the indiscriminate use of 9 VAC 5-170-160 to impose new requirements that are not mandated by the Air Board's regulations violates the precepts and dictates of the Governor's Executive Order that regulations be "used judiciously and designed carefully" so that Virginia businesses "are not burdened by unnecessary and excessive regulation."

The essence of this concern is that the Department must be required to cite some other authority for imposing a requirement than just 9 VAC 5-170-160. If the Board's regulations do not already authorize the Department to impose the new requirement, then 9 VAC 5-170-160 alone is simply not sufficient as justification for imposing that new requirement.

To comport with the Governor's Executive Order 25(98), 9 VAC 5-170-160 must be amended to clearly circumscribe the "omnibus" authority of the Department. The exercise of this authority is not without bounds and these bounds should be clearly articulated in the regulation itself. Particularly objectionable is the statement in the regulation that "except as otherwise specified, nothing in this chapter shall be understood to limit the power of the board in this regard." There are restraints under Virginia law on the authority of the Air Board and the Department to impose terms or conditions in permits. See e.g., *Commonwealth, ex rel. State Water Control Board v. County Utilities Corp.*, 223 Va. 534 (1982), finding Water Board's permit terms were "mere unilateral edicts, the quintessence of arbitrary governmental action."

To address these concerns, VMA recommends that 9 VAC 5-170-160.A be amended to read as follows:

The board may impose conditions upon permits and other approvals that are necessary to implement the Virginia Air Pollution Control Law and the regulations of the board. If the owner or other person fails without sufficient reason to adhere to the conditions, the board may cancel the permit or approval in accordance with the procedures in this chapter, the

State Air Pollution Control Law, and the Virginia Administrative Process Act. This section shall apply, but not be limited, to approval of variances, approval of control programs, and granting permits.

This language preserves for the Board and the Department the authority to impose requirements that are necessary to implement Virginia law and the Air Board's regulations and provides a standard for its application.

**RESPONSE:** The commenter suggests that 9 VAC 5-170-160 should be changed because of its alleged misuse by DEQ staff in connection with the issuance of permits. The suggested change to the provision, however, would not necessarily solve (and might even exacerbate) the problem as articulated by the commenter. Furthermore, the suggested change could render the provision ineffectual for approval actions other than permit approvals. The removal of the phrase "which are consistent with the regulations of the board," as the commenter recommends, might jeopardize the agreement between permit conditions and the board's program regulations. The removal of the second sentence ("Except as otherwise specified, . . ."), as the commenter recommends, might severely hamper the effectiveness of the regulation if the board needed to use it to implement the State Air Pollution Control Law in order to address a public health emergency or other issue. For example, this provision has been used to allow for the study and testing of new production processes rather than applying a rigid interpretation of the regulations that would have acted as a damper to technological innovation.

As the commenter observes, legal restraints limit the authority of the State Air Pollution Control Board, but because these restraints are already articulated in statutory and case law, no reason exists to repeat them in regulation.

The commenter also points out that DEQ appears to be using this authority more as the permit programs mature. This is reflective of the fact that we are now issuing more permits because of a highly active economy. As more and more situations are being permitted, DEQ is addressing more diverse industries, more difficult production processes and more regulatory applications where a permitting history does not exist. It may be true that the commenter is seeing an increase in the number of permit conditions using the 9 VAC 5-170-160 as the regulatory authority but this is reflective of the dynamic and changing nature of business activity in Virginia and not reflective of any policy or philosophy change at DEQ.

Based on the commenter's description of the alleged problem with permit issuance, it appears that disagreements sometimes arise between a regulated source and DEQ's permit staff over what terms and conditions are necessary to implement the permit programs. This is an implementation issue as opposed to a regulatory language issue. Attempting to adopt regulations that prescribe definitive standards and requirements for every possible permitting situation would greatly complicate the process of obtaining permits and result in a negative impact on the business environment in Virginia. If a source is concerned that a permit condition is not necessary and is inconsistent with the regulations, that concern is most appropriately addressed by the source and the permit

staff through discussion on a case-by-case basis, not through a change to the regulation. If the concern is not resolved, the source should, and has every right to, bring the concern to DEQ management for resolution or request that an independent party, through some form of alternate dispute resolution, address the concern.

No change to the regulation is being recommended as a result of this comment.

### Effectiveness

*Please provide a description of the specific and measurable regulatory goals of the regulation. Detail the effectiveness of the regulation in achieving such goals.*

The regulation has been effective in achieving its specific and measurable goals, which are as follows:

1. To protect public health and welfare with the least possible cost and intrusiveness to the citizens and businesses of the Commonwealth.
2. To provide general administrative provisions that support other provisions of the regulatory programs of the State Air Pollution Control Board in order to efficiently administer air quality programs.
3. To provide a consistent application of the requirements for all regulatory programs.

### Need

*Please provide the specific reasons the agency has determined that the regulation is essential to protect the health, safety or welfare of citizens or is essential for the efficient and economical performance of an important governmental function. Include a discussion of the problems the regulation's provisions are intended to solve.*

This regulation serves two vital purposes: (i) to establish provisions enabling the board and department to carry out mandates established by federal and state law and regulation; and (ii) to establish detailed legal mechanisms for compliance with those mandates. This regulation is of considerable importance to both the general public and the regulated community since it articulates the essential administrative framework for the entire regulatory program of the State Air Pollution Control Board.

General administration for the State Air Pollution Control Board had originally been addressed within the board's three major categories of regulations (stationary sources, mobile sources, and conformity). Some of the administrative provisions in one category were reiterated in one or both of the other categories, thus rendering the regulatory language unnecessarily repetitive. Furthermore, the repeated provisions were not always consistent with one another, thus creating potential problems in legal and procedural interpretation. Furthermore, certain administrative provisions in several

regulations needed to be updated in order to render them consistent with changes to the Code of Virginia.

Although it is not mandated by federal or state law, the regulation helps the State Air Pollution Control Board respond effectively to legal mandates of the Code of Virginia. To address the problems summarized in the previous paragraph, the board developed this regulation.

## Alternatives

*Please describe the process by which the agency has considered, or will consider, less burdensome and less intrusive alternatives for achieving the need. Also describe, to the extent known, the specific alternatives that have been considered and will be considered to meet the need, and the reasoning by which the agency has rejected any of the alternatives considered.*

Alternatives have been considered by the Department to meet the need. The Department has determined that retention of the regulation (the first alternative) is appropriate, as it is the least burdensome and least intrusive alternative that fully meets the statutory requirements and need for the regulation. The alternatives considered by the Department, along with the reasoning by which the Department has rejected any of the alternatives considered, are discussed below.

1. Retain the regulation without amendment. This option was chosen because the current regulation provides the least onerous method for complying with the minimum requirements of the legal mandates.
2. Make alternative regulatory changes to those required by the provisions of the legally binding state or federal mandates. This option was not chosen because it could result in the imposition of requirements that place unreasonable hardships on the regulated community without justifiable benefits.
3. Repeal the regulation or amend it to satisfy the provisions of the legally binding state or federal mandates. This option was not chosen because the regulation is effective in meeting its goals and already satisfies those mandates.

## Clarity of the Regulation

*Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.*

The Department, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

## Family Impact Statement

*Please provide a preliminary analysis of the potential impact of the regulation on the institution of the family and family stability including to what extent the regulation will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment: 4) increase or decrease disposable family income.*

It is not anticipated that these regulation amendments will have a direct impact on families. However, there will be positive indirect impacts in that the regulation amendments will ensure that the Commonwealth's air pollution control regulations will function as effectively as possible, thus contributing to reductions in related health and welfare problems.

### Recommendation

*Please state whether the agency is recommending the regulation be retained and the reasons such a recommendation is being made.*

The regulation satisfies the provisions of the legally binding state or federal requirements and is effective in meeting its goals; therefore, it is recommended that the regulation be retained without amendment.

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